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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

PP Docket No. 93-253

**REPLY COMMENTS OF
DIVERSIFIED CELLULAR COMMUNICATIONS, INC.**

Diversified Cellular Communications, Inc. ("DCC") by its counsel and pursuant to the Commission's Notice of Proposed Rulemaking (the "NPRM"), FCC 93-455, released in the above-referenced matter on October 12, 1993, hereby submits its Reply Comments in this proceeding.

I. INTRODUCTION

1. DCC is a small business involved in telecommunications ventures, including minority ownership interest in cellular systems throughout the United States. DCC filed Initial Comments in this proceeding and fully expects to participate in the application bidding process for Personal Communications Service ("PCS") authorizations as well as other services that the Commission determines will be subject to the competitive bidding process. Based on its experiences as a small business applying for FCC authorizations, DCC agrees with the Comments of many of the other interested parties which concluded that enhancements must be created and safeguards employed in order to foster the participation of small businesses in the communications industry.

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II. DEFINITION OF SMALL BUSINESS

2. The Commission should define "small business" in the competitive bidding context so as to take into account the varied start-up and capitalization costs that each of the different services will encounter, as well as the cost variations that will exist in providing these services in different markets.^{1/}

3. To further enhance the ability of small businesses to participate in the competitive bidding process, DCC recommends the implementation of rules that would allow a consortia of small businesses to participate together to reach the revenue threshold necessary to bid on the more valuable PCS licenses (i.e., those in Major Trading Areas ("MTAs")). As noted by Commissioner Barrett in his dissent to the PCS Second Report and Order,^{2/} the 10 MHz Basic Trading Area ("BTA") channel blocks which the Commission proposes to set-aside for designated entities occupy a place on the spectrum (commonly referred to as the "ghetto") that will make equipment compatibility standards very difficult to maintain. These consortiums would permit small businesses to share their resources as well as start-up and operating expenses which they will encounter in establishing PCS on these smaller, more technologically challenging, frequency blocks.

^{1/} See, Comments of the U.S. Small Business Association ("SBA Comments") at 10-11.

^{2/} In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, Gen. Docket No. 90-314 (September 23, 1993) (Barrett, A., dissenting).

4. However the Commission eventually defines "small business", DCC also recommends that the FCC not permit non-qualifying, large businesses to create a spin-off solely for purposes of qualifying for preferential treatment as a "small business" in the auction process. This would be a circumvention of the Commission's intent. Similarly, the Commission should make certain that a non-qualifying company which owns a substantial, yet minority, stake (i.e., 49%) of a small regional telephone company would not qualify as a small business.

5. The Commission must be vigilant to prevent "large" companies from taking unfair advantage of Congress' directive to provide preferences for small businesses. Congress' intent in that directive was to promote economic opportunities for small businesses, many of which are currently under-represented in the telecommunications industry, and which, without these preferences, probably would not be able to participate in the provision of these services^{3/} Artificial spin-offs of "large" companies hardly satisfy this underlying Congressional objective.

III. DETERMINING MINORITY AND WOMEN OWNERSHIP

6. The plain language of the Act requires the Commission to give special consideration to "businesses owned by members of minority groups and women." The Commission must now decide how to determine whether a business is "owned" by members of minority groups or women.

^{3/} See, Small Business Advisory Committee Report ("SBAC Report") in Docket 90-314

7. As the Small Business Advisory Committee ("SBAC") notes, there is a simple "bright line" test that would require women and minorities to own more than 50% of the voting control and equity of the business to qualify for preferential treatment. SBAC Comments at 22. However, the Small Business Administration ("SBA") opposes that type of analysis, stating that the composition of PCS applicants, especially small business applicants, must be designed to allow for the infusion of start-up capital through dilution of the equity stake of the principals. SBA Comments at 16-17. The SBA proposes that the Commission examine the "actual operational control" of the business and ensure that "the control must extend to decisions concerning capital expenditures." Id.

8. Those familiar with the Commission's experiences in giving "preferences" to minority (and formerly, women) applicants in comparative hearings for the award of broadcast licenses know the difficulty of applying and administering a non-bright-line test. The record demonstrates that many broadcast applicants were carefully crafted "shams", set up as two-tier partnerships or corporations with minorities or women in "control" (e.g., holding a majority of the voting control according to the corporate/partnership documents) but with the non-voting equity holders possessing up to 80% of the equity and exercising dominion and de facto control over the applicant by controlling the applicant's purse strings. See, e.g., Madalina Broadcasting Co., 8 FCC Rcd 6344 at paras. 336-344 (ALJ 1993) (application of Madalina dismissed on finding of non-voting shareholder as a "real

party-in-interest").

9. Therefore, the Commission should be certain that, in adopting rules defining women and minority ownership, as with small businesses, it establishes a clearly defined test that will further the interest of those "designated entities".

V. APPLICATION AND SUITABILITY OF SPECIAL PREFERENCES

10. In order to satisfy Congress' mandate and provide small businesses and businesses owned by minority and women with opportunities to participate in these auctions, the Commission suggested several measures including spectrum set-asides, bidding preferences, payment of royalties and preferential payment terms. DCC believes a combination of these measures will provide small businesses sufficient assistance to compete with larger corporations and will give minority owned businesses in general advantages sufficient enough to participate more equitably in the competitive bidding process.

A. Spectrum Set-Asides

11. DCC supports the Commission's proposal to set aside two blocks of spectrum nationwide in the broadband PCS service for bidding by designated entities only. NPRM at para. 121. The most efficient way to encourage the participation of under-represented groups is through the reservation of specific blocks of frequency.

12. The Commission has had success in the past with spectrum set asides, as demonstrated by the FM broadcast service and Instructional Fixed Television Service ("ITFS"). In each of these two cases, the Commission reserved blocks of channels solely for

non-commercial educational service providers, which are predominantly not-for-profit entities who otherwise would have been unable to provide educational programming to their local communities due to the costs of competing with commercial broadcasters for the spectrum. By establishing certain spectrum "set-asides", these entities only had to compete with similarly situated entities for the spectrum rather than with the deep-pocketed commercial telecommunications companies. DCC expects the same favorable result from the proposed broadband PCS set aside.

B. Installment Payments

13. DCC supports the use of installment, rather than lump sum, payments by designated entities as proposed by the Commission. NPRM at paras. 68-71.^{4/} Installment payments will allow designated entities to better devote their scarce initial resources to construction of the PCS system and service to the public. The income that the system generates can be used as a source for the incremental payment of the balance of the auction price.

14. After the winning bids have been determined, the successful designated entity applicants should have 10 days to make a post-auction down payment. Computation of the down payment should be made pursuant to the formula suggested by the Commission: not more than two cents (\$0.02) per Megahertz per pop based on the 1990 census. Calculation of the down payment should be provided to the successful bidder no later than the close of the auction,

^{4/} DCC supports the use of installment payments by designated entities in both auctions for the specially set-aside broadband PCS spectrum block and for all other spectrum blocks.

so that the successful applicant has the benefit of a full 10 days to make the payment. Successful non-designated entity applicants will be required to pay the entire auction bid (less the initial \$5,000 deposit) within 10 days of the auction.

15. DCC recommends that the Commission allow those companies that satisfy the criteria for a small business (non-designated entities) to finance their payments, including interest, over a five year period. This will allow small businesses, who do not have an unlimited supply of start-up capital, time to begin implementing their service and deriving revenue, before having to pay the full amount of their bid. This will in turn better enable small businesses to bid more for the spectrum.

V. THE BIDDING PROCESS

16. DCC agrees with the Commission's proposal to require qualified bidders to tender an "up-front payment" prior to the auction, as a method of ensuring that only serious, qualified bidders participate in the auctions. However, in determining the up-front payment that qualified bidders would have to submit, the Commission should take into consideration the variable value of the different channel blocks. For example, the Commission proposes to establish an up-front payment of 2 cents per pop per megahertz for PCS licenses. This method is based on the Congressional Budget Office's estimate that the auction value of a 25 megahertz PCS license would be approximately \$15 per pop or about 60 cents per pop per megahertz. NPRM at para. 103 n.98. As this method is

based on the value of a 25 megahertz channel block, the up-front payment for a 20 megahertz (or even 10 megahertz) should be decreased correspondingly with the smaller value of those blocks. Fifteen dollars per pop for a 25 megahertz block would be equal to approximately twelve dollars per pop for a 20 megahertz block.

17. The Commission should be required to pay interest on the money it receives from qualified bidders demonstrating their serious intent to bid. Not every bidder will be successful and under the terms of the NPRM, the money would remain with the Commission indefinitely.^{5/}

VI. SAFEGUARDS

18. DCC strongly opposes the Commission's proposal to leave the current Petition to Deny process fully intact. Instead, the Commission should amend the process to provide greater assurances for the winning bidder. Currently, an applicant must pay an up-front payment to qualify as a bidder on a spectrum block, followed by an additional payment if the applicant is declared the winning bidder -- perhaps even paying the full amount of the license, prior to the filing of any Petitions to Deny. If a Petition to Deny is filed, the "winning" bidder would thus have neither a license nor the money it paid for that license while the FCC reviews the Petition, a time span that could, based upon the cellular "experience", cover eighteen (18) to twenty-four (24) months.

^{5/} See also, Comments of JMP Telecom Systems, Inc. at 6 (the FCC should establish short-term accounts for each bidder by buying Treasury bills to earn interest on the up-front tender payment).

19. The Commission's current Petition to Deny procedure conflicts directly with its renewal policy, in which it seeks to provide greater stability for licensees by granting them a 10 year license term along with a high renewal expectancy. The Petition to Deny process does little to promote stability, and may in fact cause some bidders to think twice before investing the substantial sums necessary to become licensees if the rules allow a competitor to simply choose to declare "open season" on the winning applicant, and thereby place a two-year "hold" on the licensee's grant as well as invested funds.

20. DCC recommends three methods by which the Commission can avoid the inequities in the current Petition to Deny process. The Commission should state that only those applicants who have actually bid on the market in question would be eligible to file a Petition to Deny against the winning applicant for that market. Second, the Commission should embrace the policy adopted by the Common Carrier Bureau limiting payments to those filing and subsequently withdrawing Petitions to Deny to no more than the prudent, documented expenses incurred by them to bring the Petition.^{6/} Finally, the Commission should establish that if a Petition to Deny is filed, the winning bidder should not have to pay the balance of the funds due until after the FCC has dismissed the Petition and is ready to grant the license.

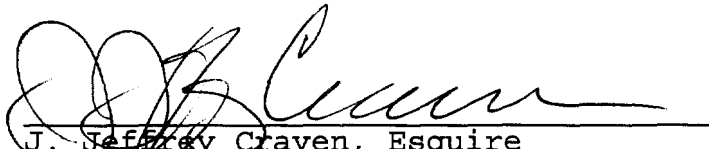
^{6/} See, Cellular Applications for Unserved Areas, (Third Report and Order), 71 RR 2d 644, 649 (1992).

WHEREFORE, in light of the foregoing reasons, DCC hereby respectfully requests that the Commission adopt these positions as they are fully consistent with the terms of the Budget Act as well as the public interest.

Respectfully submitted,

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